more counties. For example, seven senatorial districts were located in Fulton County, three each in DeKalb and Chatham Counties, and two in each of the Counties of Bibb, Cobb, Muscogee and Richmond. The 12th Senatorial District is composed of Dougherty County alone, while the 52nd is composed only of Floyd County. The remainder may be described as plural county districts. The remaining districts are composed of from two to seven counties.

The apportionment of the House of Representatives was not changed. Its apportionment, as the court noted in *Toombs* v. *Fortson*, is based largely on geography, with representatives from the one hundred and three less populous counties of the state making a constitutional majority of the two hundred and five members of the House. At the same time, they represent only twenty two and one half percent of the population of the state. It was also noted that the eight most populous counties, although containing forty one percent of the population of the state, elect only twenty four of the two hundred and five representatives, or a little less than twelve percent of the total number. Each county has at least one representative while no county can have more than three.

The statute reapportioning the Senate, supra, in § 9 thereof, provides as follows:

> [Vol. 140] "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all voters of the county in which such Senatorial District is located."

It was the intent of the General Assembly as expressed in § 12 of this statute that the Senate be apportioned on population and the House on geography. At the same extraordinary session an amendment to the Constitution was proposed to provide that the Senate should consist of fifty four members and that the General Assembly should have authority to create, rearrange and change senatorial districts and to provide for the election of senators from each senatorial district or from several districts embraced

within one county. This proposal was adopted by the people of Georgia in the general election of 1962, and by the people of all counties having plural districts save Bibb.

It is that portion of the quoted provision relating to elections in districts consisting of less than one county that plaintiffs seek to have declared unconstitutional as conflicting with the equal protection clause of the Fourteenth Amendment.[1]

They buttress their contention of invidious discrimination on the proposition that the essence of representative [fol. 141] government is the selection of the representative by those whom he represents, citing *Toombs* v. *Fortson*, supra. They state that the representatives elected in the plural district counties are not elected by those whom they represent since voters so situated do not have the opportunity of choosing their own senator, but must join with others to choose a group of senators. They assert, without contradiction, on the basis of the population of the various districts in Fulton County that only eighteen percent of the voters in the other six districts of that county could nullify the unanimous choice of the voters in the 34th Senatorial District and thrust a representative upon voters of that district for whom no one at all within the district had voted. Of course, this is carried to an extreme but it cannot be disputed that the selection of a senator from these districts is not within the control and province of the voters of the separate districts. By way of contrast, this is not the case with voters residing in districts not situated in plural district counties.

The Secretary of State urges that countywide voting is a rational and permissive classification in the interest

[1] Shortly after the enactment of this statute, and prior to the special election of senators under it, litigation ensued in the state court with respect to its constitutionality under the state constitution. That suit, which affected only those senatorial districts lying within the counties of Fulton and DeKalb, resulted in a decree requiring that the elections be held on a districtwide basis only, and this was the case. However, the senators from the districts lying within the other counties having plural districts were elected on a countywide basis. This was prior to the amendment to the state constitution.

of county government.[1] He points to the fact that plaintiffs have a political remedy and have not availed themselves of it even though one of the plaintiffs is a member of the State Senate. It is argued that there has been no dilution or debasement of the votes of plaintiffs since the whole of the fractional parts, i.e., their being able to vote for more than one senator, is equal to the vote of one residing in a district where he votes for one senator only.

[fol. 142] We hold that the complaint is meritorious. There is no genuine issue as to any material fact and it appears that plaintiffs are entitled to judgment as a matter of law. Accordingly, the motion of plaintiffs for summary judgment will be granted, and that of the defendant Secretary of State denied.

The statute causes a clear difference in the treatment accorded voters in each of the two classes of senatorial districts. It is the same law applied differently to different persons. The voters select their own senator in one class of districts. In the other they do not. They must join with others in selecting a group of senators and their own choice of a senator may be nullified by what voters in other districts of the group desire. This difference is a discrimination as between voters in the two classes. The question is whether the discrimination reaches the point of being invidious for that is the type of discrimination that is proscribed by the Fourteenth Amendment. The Supreme Court in *Gray* v. *Sanders*, supra, in discussing the Georgia County Unit System where the state was divided into election units varying in population, with the result that voters, as between units, were treated differently to the extent that the votes of some were diluted, pointed out that the system violated the equal protection clause of the Fourteenth Amendment and said:

> " * * * there is no indication in the Constitution that homesite * * * affords a permissible basis for distinguishing between qualified voters within the State."

---

[1] Defendants Gumby and Mann did not join in the motion for summary judgment. They appeared at the hearing on the motions, through counsel, and did not dispute the facts, nor did they contest the position of the Secretary of State and plaintiffs that the case was ripe for summary judgment.

We think the rationale of that case is applicable here by analogy. The unit system applied in statewide races and brought about a dilution of votes on the basis of homesite through the use of units. Here the dilution or debase-[fol. 143] ment is of the right of some to choose their representative. It is discrimination in another form, but we think it necessarily follows that voters in some senatorial districts cannot be treated differently from voters in other senatorial districts. The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not. It is an invidious discrimination tested by any standard. Cf., tests laid down by this court in *Toombs* v. *Fortson*, *supra*, and *Sanders* v. *Gray*, N.D. Ga., 1962, 203 F.Supp. 158. We agree that the essence of representative government is the choosing of a representative by those he represents. See memorandum opinion in *Toombs* v. *Fortson*, unpublished, dated September 5, 1962. And this principle must be applied in an evenhanded manner. Its application may not be withheld from some while at the same time being afforded others, once a political system such as a division of the state into senatorial districts is adopted.

It is contended that the character of the discrimination can be justified on the basis that harmony between senators is required so that the county in which they reside may be better represented. This is said to be a reasonable classification. See *McGowan* v. *State of Maryland*, 1960, 366 U.S. 420, 51 S.Ct. 1101, 6 L.Ed.2d 393, on the subject of permissible classifications by states. The answer to this is that the Senate is to represent population and not geography. That was the intent of the General Assembly in reapportioning. Protecting the interest of counties may be a high motive but it cannot be done at the expense of the voters of the populous counties as is the case here.

[fol. 144] With respect to the fact that plaintiffs have not sought to use their available political remedy, our attention is called to the case of *Spahos* v. *Mayor and Councilmen of the Town of Savannah Beach*, S.D. Ga., 1962, 207 F.Supp. 688, affirmed, 1962, 371 U.S. 206, 83 S.Ct. 304, 9 L.Ed.2d 269. There the court in testing for invidiousness did determine

that plaintiffs had a political remedy available as distinguished from the stranglehold situation present in *Baker* v. *Carr*, supra, but there was another overriding consideration in dismissing the complaint. That was that the classification of voters being attacked was found to have a reasonable basis. This is not the case here. Moreover, the teaching of *Wesberry* v. *Sanders*, supra, decided thereafter by the Supreme Court, is that available political remedies, as was the case with both state and federal legislative remedies available, is not a bar or even a deterrent to an adjudication or declaration of constitutional rights. It may be the subject of consideration in the determination of the relief to be thereafter accorded, but not in the declaration of rights.

In sum, the Senate was apportioned to population. The state through the statute in question and the medium of constitutional amendment, divided the state into population districts. Having done so, and the circumstances as they relate to voters residing in each being the same; they are entitled to equal treatment. For these reasons, we hold that portion of the statute in question here, to-wit, the requirement "that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all voters of the county in which such Senatorial District is located" to be unconstitutional on the basis of being violative of the equal protection clause of the Fourteenth [fol. 145] Amendment. It is therefore null and void. This will leave that portion of the statute in force which provides that each senator shall be elected by the voters of the district of which he is a resident.

The injunctive relief sought is denied. There is no indication that defendants will not follow the law as declared. In fact, plaintiffs stated in open court that this was the case and that they believed injunctive relief to be unnecessary in the event the court voided the statute. These respected and responsible officials are simply caught up in the ferment of change stemming from the recent concept of applying federal constitutional standards to the political process through the use of the judicial process, *Baker* v. *Carr*, supra, and its progeny. We think that a declaration of

rights under the circumstances, with the attendant striking of the infected portion of the statute, will suffice.

Plaintiffs may submit an appropriate order after due notice to counsel for defendants.

This the 27 day of March, 1964.

Griffin B. Bell, United States Circuit Judge; Frank A. Hooper, United States District Judge; Lewis R. Morgan, United States District Judge.

[fol. 146] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8756

JAMES W. DORSEY, DAN I. MACINTYRE, III and JAMES EDWARD MANGET, Plaintiffs,

v.

BEN W. FORTSON, JR., as Secretary of State of Georgia; EUGENE GUNBY, Ordinary of Fulton County; and KATHERINE E. MANN, Ordinary of DeKalb County, Defendants.

FINAL JUDGMENT OF THE COURT—Filed and Entered April 6, 1964

The above and foregoing matter having been heard by a Three Judge Court as an action for declaratory judgment and on motions for summary judgment filed by the plaintiffs and by the defendant, Ben W. Fortson, Jr., and the matter properly being before the Court in accordance with Rules 56 and 57 of the Rules of Civil Procedure, and the Court having entered an opinion dated March 27, 1964 in favor of the plaintiffs, Now Therefore

It Is Hereby Ordered, Adjudged, Decreed and Declared that so much of the statute here under consideration, to wit:

that part of Section 9 of the Georgia Laws, Extraordinary Session, September-October, 1962, at page 7 et seq. that provides "except that the senators from those senatorial districts consisting of less than one county shall be elected by all voters of the county in which such senatorial district is located" is unconstitutional, unenforceable, null and void, as being in violation of the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States.

It Is Further Ordered and Adjudged that the Motion for Summary Judgment of the defendant, Fortson, is overruled and that the Motion for Summary Judgment of the plaintiffs is granted.

[fol. 147] It Is Further Ordered and Declared that each and every senator to the State Legislature for the State of Georgia shall be elected by the voters of his own district, without regard to whether said senatorial district comprises an entire county or more than one county, or less than one county.

This 6th day of April, 1964.

Griffin B. Bell, Judge, United States Circuit Court, Sitting as Senior Judge of a Three Judge Court for the Northern District of Georgia; Frank A. Hooper, Judge, United States District Court; Lewis R. Morgan, Judge, United States District Court.

[fol. 149] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 8756

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 14, 1964

I.

Notice is hereby given that Ben W. Fortson, Jr., as the Secretary of State of the State of Georgia, a Defendant above named, hereby appeals to the Supreme Court of the United States from the order and final judgment granting the Plaintiffs' motion for summary judgment, entered in this action on March 27, 1964, and April 6, 1964, respectively.

This appeal is taken pursuant to 28 U. S. C., Sections 1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States.

III.

The following questions are presented by this appeal:

(A) Whether a state legislature, containing fifty-four senators, may divide a state into fifty-four senatorial districts according to population, some districts containing [fol. 150] one or more counties and some counties containing two or more districts, and require that the senators from the districts containing one or more counties be elected by the voters within their respective districts, while also

requiring that the senators from the multi-district counties be elected by the voters within their respective counties;

(B) Whether that part of Section 9 of an Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides that "the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located", denies to the Plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

Eugene Cook, The Attorney General, Paul Rodgers, Assistant Attorney General, Counsel for the Defendant, Ben W. Fortson, Jr., as the Secretary of State of the State of Georgia.

April 14, 1964

[fol. 151] Proof of Service (omitted in printing).

[fol. 152] [File endorsement omitted]

In the United States District Court

For the Northern District of Georgia

Atlanta Division

Civil Action No. 8756

[Title omitted]

Motion for Stay Pending Appeal—Filed April 14, 1964

Now Comes Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, a Defendant in the above styled cause, and moves the Court for an order staying the effectiveness of the order and final judgment entered in favor of the Plaintiffs herein on March 27, 1964, and April 6, 1964, respectively, pending appeal to the Supreme Court of

the United States and until the determination thereof, and as ground therefor says:

1.

On January 24, 1964, the Plaintiffs filed their complaint herein seeking declaratory and injunctive relief against the enforcement of the State statutory provision requiring the county-at-large election of State senators from multi-senatorial district counties, which was alleged to be violative of the guarantees of the Fourteenth Amendment to the Constitution of the United States.

2.

On March 6, 1964, and March 13, 1964, motions for summary judgment were filed by this Defendant and the Plaintiffs, respectively.

[fol. 153]

3.

On March 27, 1964, and April 6, 1964, the Court entered an order and final judgment, respectively, granting the motion for summary judgment of the Plaintiffs and denying the motion for summary judgment of this Defendant.

4.

On April 14, 1964, this Defendant filed in the Court a notice of appeal from such order and final judgment to the Supreme Court of the United States and, out of an abundance of precaution, also filed a notice of appeal from such order and final judgment to the United States Court of Appeals for the Fifth Circuit.

5.

This Defendant is moving with all possible diligence in order to have the appeal docketed in the Supreme Court of the United States within the next fourteen days, and the Defendant intends to file a motion to advance so that such appeal may be heard and determined prior to the adjournment of the term.

6.

Such appeal involves difficult and novel questions of law in an area of constitutional development in which standards have not yet been formulated by the Supreme Court of the United States and, furthermore, the appeal concerns the method of electing State senators which is of fundamental importance in the government of the people of Georgia. In view of these circumstances, there should be no disruption of the State's electoral process unless required by the Supreme Court.

7.

Unless, pending this Defendant's appeal to the Supreme Court of the United States, such order and final judgment of this Court is stayed, irreparable harm will result to the State of Georgia and its citizens should such order and judgment be reversed on appeal.

[fol. 154] Wherefore, this Defendant moves the Court to stay the effectiveness of the order and final judgment entered in this action pending the disposition of this Defendant's appeal herein, and for that purpose to fix the amount of the bond prescribed by Rule 62(d) of the Federal Rules of Civil Procedure if the Court deems such a bond to be necessary under the circumstances of this case.

Eugene Cook, The Attorney General, Paul Rodgers, Assistant Attorney General, Counsel for the Defendant, Ben W. Fortson, Jr., as the Secretary of State of the State of Georgia.

April 14, 1964

[fol. 155] Certificate of Service (omitted in printing).

[fol. 156] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

RESPONSE TO MOTION FOR STAY PENDING APPEAL
—Filed April 23, 1964

Comes now the plaintiffs in the captioned case and file this response to the motion of the defendant, Ben W. Fortson, Jr., for a stay pending his appeal from the judgment of this Court.

1.

The plaintiffs admit the allegations of paragraphs 1, 2, 3, and 4 of defendant's motion.

2.

The plaintiffs can neither admit nor deny the allegations of paragraph 5 of the defendant's motion.

3.

The plaintiffs deny the allegations of paragraphs 6 and 7 of the defendant's motion.

4.

To stay the judgment of this Court in the above case pending appeal of the defendant would deny the plaintiffs, and others similarly situated to plaintiffs, of the protection of the United States Constitution in the forthcoming 1964 elections and would cause irreparable harm to the [fol. 157] voters of the multi-district counties of the State of Georgia.

5.

This Court has declared the Georgia statute in question unconstitutional to the extent set forth in petitioner's complaint and this Court should not now allow the officials of the State of Georgia a stay.

Wherefore, the plaintiffs request the Court to deny the defendant's motion for a stay of the effectiveness of its previously entered order and final judgment in this action.

William C. O'Kelley, Attorney for Plaintiffs.

[fol. 160] [File endorsement omitted]

In the United States District Court
For the Northern District of Georgia
Atlanta Division
Civil Action No. 8756

James W. Dorsey, Dan I. MacIntyre, III and James Edward Manget, Plaintiffs,

v.

Ben W. Fortson, Jr., as Secretary of State of the State of Georgia, Eugene Gunby, as Ordinary of Fulton County, Georgia, and Katherine E. Mann, as Ordinary of DeKalb County, Georgia, Defendants.

Order on Motion for Stay Pending Appeal
—April 28, 1964

The motion of the Secretary of State of the State of Georgia, one of the defendants in the within matter, for stay pending appeal is Denied.

This 28th day of April, 1964.

Griffin B. Bell, United States Circuit Judge; Frank A. Hooper, United States District Judge; Lewis R. Morgan, United States District Judge.

[fol. 161] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 162]

SUPREME COURT OF THE UNITED STATES

No. 178, October Term, 1964

BEN W. FORTSON, JR., as Secretary of State of Georgia, Appellant,

vs.

JAMES W. DORSEY et al.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1964

Appeal from the United States District Court for the Northern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

Supreme Court, U.S.
FILED
JUN 12 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

Number [redacted] 178

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,
Appellant,

vs.

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

JURISDICTIONAL STATEMENT.

EUGENE COOK,
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PAUL RODGERS,
Assistant Attorney General,
Counsel for the Appellant.

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June 11, 1964.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Cases Cited.

Statutes Cited.

Miscellaneous Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

Number .....

BEN W. EORTSON, JR., as Secretary of State of the State of Georgia,
Appellant,

vs,

JAMES W. DORSEY, DAN I. MacINTYRE, III, and JAMES EDWARD MANGET,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

JURISDICTIONAL STATEMENT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Appellant submits herewith his Jurisdictional Statement as required by Rules 13 and 15 of the Revised Rules of the Supreme Court of the United States.

OPINION BELOW.

The opinion and final judgment of the Three-Judge District Court (R. 137-147) are unreported, and are reprinted in the appendix.

JURISDICTION.

This is a suit brought under 28 U. S. C. 1343 and 2201 by three registered voters of the Atlanta metropolitan area in the United States District Court for the Northern District of Georgia against the Secretary of State of Georgia and two local election officials seeking to invalidate, on Federal constitutional grounds, a State law requiring the county-at-large election of State senators in counties apportioned plural senatorial representation, and to enjoin the defendants from complying with the provisions of the challenged law. Jurisdiction of the suit is vested in the Three-Judge District Court by 28 U. S. C. 2281.

In an opinion rendered on March 27, 1964, and in final judgment rendered on April 6, 1964, the Three-Judge District Court granted the declaratory relief sought by the plaintiffs but denied the injunctive relief on the ground that there "is no indication that defendants will not follow the law as declared" (R. 145). On April 14, 1964, the notice of appeal to this Court from such opinion and judgment was filed with the Clerk of the District Court (R. 149).

The jurisdiction of this Court to review by direct appeal such opinion and final judgment is conferred by 28 U. S. C. 1253 and 2101 (b).

The following cases sustain the jurisdiction of this Court to review such opinion and judgment on direct appeal in this case: **Baker v. Carr** (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691; **Gray v. Sanders** (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801; and **Wesberry v. Sanders** (1964), 376 U. S. 1, 11 L. ed. 2d 481.

This case presents a unique jurisdictional feature because the denial of injunctive relief in the District Court

was theoretically favorable to the Appellant who, nevertheless, seeks to directly appeal its judgment to this Court under a statute (28 U. S. C. 1253) apparently restricted to use by a party adversely affected by the grant or denial of injunctive relief. However, this appeal appears to be well within the purview of the statute because it is plain that the relief sought in the complaint demanded the convocation of the Three-Judge Court to hear and determine the case. Several decisions of the Court have mentioned this criterion in finding the requisite jurisdiction for direct appeal. See: **United States v. Georgia Public Service Commission** (1963), 371 U. S. 285, 287, 2d par., 9 L. ed. 2d 317, 320, l. col. 2d par., 83 S. Ct. 397; **Paul v. United States** (1963), 371 U. S. 245, 249, last par. 9 L. ed. 2d 292, 296, r. col., 3d par., 83 S. Ct. 426; **Florida Lime and Avocado Growers, Inc. v. Jacobsen** (1960), 362 U. S. 73, 85, 4 L. ed. 2d 568, 576, l. col., last par., 80 S. Ct. 568; **Stainback v. Mo Hock Ke Lok Po** (1949), 336 U. S. 368, 376, last par., 93 L. ed. 741, 748, l. col., 2d par., 69 S. Ct. 606; and **Rorick v. Board of Commissioners of Everglades Drainage District** (1939), 307 U. S. 208, 212, 2d par., 83 L. ed. 1242, 1244, l. col., last par., 59 S. Ct. 808.

Furthermore, it is clear that the plaintiffs received substantial redress of their grievance from the District Court and that the denial of the injunctive relief resulted solely from the willingness of the defendants to comply with any judgment entered, and because the District Court believed that the plaintiffs would be entitled to such relief if it became necessary to enforce the judgment. To deny a direct appeal under these circumstances would mean that a party, enjoined because of his intention of violating a declaratory decree, would be entitled to a speedy appeal to this Court, while, on the other hand, a party, not enjoined because of his willingness to comply with a declaratory decree, would be forced to travel through the Court

of Appeals in order to obtain the judgment of this Court. In other words, the good faith of a party under such an artificial distinction would be penalized, while a party exhibiting bad faith would be placed in favored position for pursuing his appeal. Obviously, such an illogical and unreasonable result should be avoided."

As a precautionary measure, the Appellant has appealed the judgment of the District Court to the Court of Appeals for the Fifth Circuit (Docket No. 21587) and within the next several days he intends to file with this Court a petition for writ of certiorari to the Court of Appeals, under 28 U. S. C. 1254 (1), prior to its rendition of judgment. In the event this Court disagrees with the above contentions and finds that only the Court of Appeals has jurisdiction of an appeal from the judgment of the District Court, then the appellant respectfully invokes the jurisdiction of this Court to review the judgment of the District Court by such writ of certiorari. **Turner v. City of Memphis** (1962), 369 U. S. 350, 11 L. ed. 602, 84 S. Ct. 636; **Stainback v. Mo Hock Ke Lok Po** (1949), 336 U. S. 368, 93 L. ed. 741, 69 S. Ct. 606.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 9 of the Senatorial Reapportionment Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides in pertinent part that:

> Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, **except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in**

which such Senatorial District is located. (The emphasis indicates the language invalidated by the District Court.)

Paragraph I of Section II of Article III of the Constitution of the State of Georgia (Ga. Code Ann., Sec. 2-1401), as ratified by the people on November 6, 1962, provides that:

> (a) Number and Apportionment of Senators. The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change Senatorial Districts and to provide for the election of senators from each Senatorial District, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable.
>
> (b) Interim Ratification. An Act providing for the reapportionment of the State Senate, enacted by the General Assembly at the extraordinary Session which convened on September 27, 1962, which Act made special provision for the election of Senators for the 1963-64 term and all elections held thereunder, are hereby ratified.

QUESTIONS PRESENTED.

Whether a state legislature, containing fifty-four senators, may divide a state into fifty-four senatorial districts according to population, some districts containing one or more counties and some counties containing two or more districts, and require that the senators from the districts containing one or more counties be elected by the voters within their respective districts, while also requiring that the senators from the multi-district counties be elected by the voters within their respective counties.

Whether that part of Section 9 of the Senatorial Reapportionment Act of the General Assembly of the State of Georgia, approved October 5, 1962 (Ga. Laws, Sept.-Oct., 1962, Extra. Sess., p. 7, at p. 30; Ga. Code Ann., Sec. 47-102), which provides that "the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located", denies to the Appellees the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

STATEMENT.

This is an appeal from the final judgment of a Three-Judge District Court for the Northern District of Georgia granting summary judgment against the Secretary of State of the State of Georgia and two local election officials in an action brought by three registered voters to invalidate, on Federal constitutional grounds, a State law requiring the county-at-large election of State senators in counties apportioned plural senatorial representation, and to enjoin such officials from complying with the provisions of the challenged law. The action originated out of the following circumstances.

In **Toombs v. Fortson,**[1] a three judge district court determined on May 25, 1962, that so long as the General Assembly of Georgia "does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."[2]

On September 14, 1962, the Governor of Georgia issued his Proclamation[3] convening the General Assembly in extraordinary session on September 27, 1962, for the purpose, inter alia, of considering and enacting laws relating to the reapportionment of the Senate within the requirements of the **Toombs** case. Upon convening, the General Assembly expeditiously went about the business of considering the reconstitution of the Senate, which culminated on October 5, 1962, in the enactment into law of the Senatorial Reapportionment Act[4] apportioning the membership of the Senate entirely on a population basis as required by the **Toombs** case.

---

[1] (D. C.—N. D. Ga.—1962), 205 F. Supp. 248.

[2] Id., p. 257, 1 col. (5). This determination was reiterated in a supplemental decision, dated September 5, 1962, which is unreported.

[3] Ga. Laws, Sept.-Oct. 1962, Extra Sess., pp. 3-5.

[4] Id., pp. 7-31.

The Act divided the State into fifty-four senatorial districts, twenty-one of which are wholly contained within the State's seven most populous counties.[5] The Act requires that "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located."[6]

Also during this extraordinary session, the General Assembly, by the requisite two-thirds constitutional majority in each House, adopted a Resolution[7] proposing the following Amendment to the State Constitution:

> Section 1. Article III, Section II, Paragraph I of the Constitution is hereby amended by striking said Paragraph in its entirety and inserting in lieu thereof the following:
>
> "Paragraph 1. (a) Number and Apportionment of Senators—The Senate shall consist of fifty-four (54) members. The General Assembly shall have authority to create, rearrange and change Senatorial Districts and to provide for the election of senators from each Senatorial District, or from several districts embraced within one county, in such manner as the General Assembly may deem advisable.
>
> "(b) Interim Ratification—An Act providing for the reapportionment of the State Senate, enacted by the General Assembly at the extraordinary Session which convened on September 27, 1962, which Act made special provision for the election of Senators for the 1963-64 term and all elections held thereunder, are hereby ratified."

---

[5] The map on page 52 of the Record shows the senatorial districts and the population per district.

[6] Id., p. 30, 1st par.

[7] Id., pp. 51-52 - Approved October 8, 1962.

Pursuant to this Resolution, the ballots and ballot labels used in the General Election held on November 6, 1962, contained the question as to whether the proposed Amendment should be ratified. At the Election, the people ratified such Amendment by a vote of 119,502 for and 75,598 against.[8] The Amendment carried in each of the multi-senatorial district counties except Bibb (R. 45-47).

On January 24, 1964, State Senator MacIntyre of the Fortieth Senatorial District (contained within Fulton County) and two registered voters of Fulton and DeKalb Counties, pursuant to 28 U. S. C. 1343 and 2201, filed a complaint in the United States District Court for the Northern District of Georgia (R. 4). This complaint alleged the adoption of the above statutory and constitutional provisions and sought the convocation of a three-judge district court pursuant to 28 U. S. C. 2281 and 2284, and asked that such court enter a judgment: declaring that the State law requiring the county-at-large election of State senators in the seven counties apportioned plural senatorial representation to be in violation of the Fourteenth Amendment to the Federal Constitution; and requiring that the senators from the seven multi-district counties be elected only by the voters of their respective districts; and enjoining the Appellant and the Ordinaries (election officials) of Fulton and DeKalb Counties from complying with the provisions of such State law (R. 8-9).

It is interesting to note that the complaint was filed during the early part of the 1964 regular session of the General Assembly,[9] and that a search of the legislative records reveals that no bill was introduced by Senator MacIntyre or any other member of the Legislature at

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[8] Ga. Laws, 1963, pp. 844-847. See also the Affidavit of the Secretary of State (R. 40-44).

[9] The General Assembly had convened in regular session on January 13, 1964, pursuant to Art. III, Sec. IV, Par. III of the St. Const. (Ann. Code, Sec. 2-1603).

either the 1963 or 1964 regular sessions to require such senators to run only within their respective districts (R. 48-51).

On February 18, 1964, the Appellant filed his answer and defense admitting the allegations of fact contained in the complaint, but denying that the Appellees were entitled to any relief (R. 15), and on March 6, 1964, he moved for the entry of summary judgment dismissing the action (R. 38). A cross motion for summary judgment was filed by the Appellees on March 13, 1964 (R. 88).

After oral argument, the District Court, on March 27, 1964, granted summary judgment in favor of the Appellees. In its opinion, the Court concisely stated the competing contentions of the parties in the following terms (R. 141):

> They (Appellees) state that the representatives elected in the plural district counties are not elected by those whom they represent since voters so situated do not have the opportunity of choosing their own senator, but must join with others to choose a group of senators. They assert, without contradiction, on the basis of the population of the various districts in Fulton County that only eighteen percent of the voters in the other six districts of that county can nullify the unanimous choice of the voters in the 34th Senatorial District and thrust a representative upon voters of that district for whom no one at all within the district had voted. Of course, this is carried to an extreme but it cannot be disputed that the selection of a senator from these districts is not within the control and province of the voters of the separate districts. By way of contrast, this is not the case with voters residing in districts not situated in plural district counties.

The Secretary of State urges that countywide voting is a rational and permissive classification in the interest of county government. He points to the fact that plaintiffs have a political remedy and have not availed themselves of it even though one of the plaintiffs is a member of the State Senate. It is argued that there has been no dilution or debasement of the votes of plaintiffs since the whole of the fractional parts, i. e., their being able to vote for more than one senator, is equal to the vote of one residing in a district where he votes for one senator only.

The District Court then drew an analogy from **Gray v. Sanders**[10] and determined that the challenged law created an invidious discrimination (R. 142). On April 6, 1964, the Court entered final judgment in accordance with its opinion (R. 146).

THE QUESTIONS ARE SUBSTANTIAL.

The decision of the District Court raises serious questions of widespread importance concerning the permissible scope of State action in developing and experimenting with legislative apportionments. The substantiality of these questions is illustrated by the following considerations.

A. No Mathematical Devaluation of the Vote.

The State Senatorial Reapportionment Act has allotted the voters of Fulton County seven Senators, the voters of Chatham and DeKalb Counties three Senators each, and the voters of Bibb, Cobb, Muscogee and Richmond Counties two each. The relief sought in the complaint affects only these seven most populous counties and is predicated upon the assumption that each of these counties had been apportioned the full number of senators required by its population (see also R. 23). Consequently, all

[10] (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801.

parties agree that it is legal for each district to elect one senator. The sole issue presented by this case is whether it is legal for the senators from the multi-district counties to be elected county-wide.

The present apportionment of both Houses of the General Assembly is predicated on the political autonomy of the counties. The people of Georgia through constitutional ratification have chosen to regard the county as an indivisible electoral unit in the election of the membership of the General Assembly. Consequently, the senators from those counties entitled to plural senatorial representation are elected county-at-large. The objective of such an at-large election is rational and intelligible because it stimulates unity and harmony within the senatorial delegation in seeking the attainment of the political goals of the county electorate. This position does not rest upon any theory of county sovereignty or upon any analogy between county and state, but merely upon the fact that county government over a period of years has produced an electoral homogeneity worthy of reflection in legislative representation.

The challenged method of electing senators in this case does not produce any mathematical devaluation of the vote. For example, let us compare the status of a Fulton County voter with one who resides in a rural district electing a single senator. The Fulton voter is a part of an electorate which is approximately seven times larger than the electorate of which the rural voter is a part, however, the Fulton County voter has the right to vote for seven senators whereas the rural voter may only vote for one. Theoretically, the rural voter would have a greater influence upon his single senator than the Fulton voter would have upon any one of his seven senators, but the latter's aggregate influence upon each of his senators would equal the rural voter's influence upon his single

senator. In other words, the Fulton voter has an advantage in being able to vote for seven senators, but this advantage is offset by his being a part of the large electorate necessary to support the representation of seven senators.

Another approach is helpful in analyzing this matter. In **Baker v. Carr,**[11] **Gray v. Sanders,**[12] and **Wesberry v. Sanders,**[13] this Court has espoused its "one man-one vote" formula of political equality. The most exact proportionate representation under this formula would be secured by making a single district of the State and electing all of the senators by the people at-large. Each voter would then have his absolute and equal weight with every other voter in selecting the senators. This arrangement would apparently be legal although the electorate would be greatly inconvenienced in attempting to intelligently fill fifty-four Senate seats. However, there would be no doubt that the "one man-one vote" formula had been applied with mathematical exactitude.

It is generally recognized that a state may apportion one of its legislative houses according to population by dividing the state into districts containing substantially equal populations and that such an apportionment would not violate the Equal Protection Clause. However, due to the never-ceasing occurrence of births, deaths and migrations, it is impossible to divide the State into fifty-four districts containing precisely equal populations. Therefore, in districting we are forced to accept the imprecise standard of substantial equality of population among the districts because no two districts could be or could long remain exactly equal to each other in population. Therefore, the voters in the lesser populated districts would have a slight, though permissible, political advantage over

[11] (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691

[12] (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801

[13] (1964), 376 U. S. 1, 11 L. ed. 2d 481.

those voters in the more populous districts. Obviously, some discrimination is always inherent in districting.

In carrying this thinking a step further, let us consider the Fulton County Districts. This Court may judicially know that according to the 1960 Federal Census the Fulton Districts range in population from a low of 74,834 in the 40th (Appellee MacIntyre's) to a high of 82,888 in the 35th (R. 52). Consequently, if senators were elected only in their districts, then the voters of the 40th would have a stronger political voice in the Senate than the voters of the 35th. If, on the other hand, the senators are elected county-at-large, then these variations in political strength among the voters within the county would be eliminated and precise equality would reign county-wide.

According to the 1960 Census, no two of Georgia's fifty-four senatorial districts have equal populations (R. 52). This results in there being fifty-four shades of permissible discrimination in voting strength among the districts. However, if the twenty-one senators assigned to the seven multi-district counties are elected county-at-large, then these shades of permissible discrimination are reduced to forty. All parties agree that the election of senators within their districts is not invidiously discriminatory irrespective of the fifty-four permissible shades of discrimination. Therefore, why would not the challenged method of electing the Senate, which is less discriminatory, offend the Equal Protection Clause?

B. No Invidious Discrimination Between Single and Multi-Member Districts.

As we have seen, the State Senatorial Reapportionment Act divided the State into fifty-four senatorial districts and, by virtue of requiring at-large elections in multi-district counties, into forty senatorial constituencies. In effect, the Bill divided the State into thirty-three single-

member districts and seven multi-member districts. This districting results in the creation of **two** differences in treatment among the voters of the State in the election of senators. **First**, voters in the more populous districts have the opportunity of electing plural senatorial representation, while the voters in any other district may only elect the single senator apportioned to them. **Second**, the voters of a district within a county having plural senatorial representation are not permitted to wholly elect a senator to represent only their district, but are required to join with the voters of the other districts within the county in electing the senators assigned to the county.

As to the first difference, it is clear that the combination of single and multi-member districts in structuring one or both chambers of a bicameral legislature is widely practiced. Maurice Klain, in his work entitled "A New Look at the Constituencies: The Need for a Recount and a Reappraisal,"[14] demonstrates the prevalence of multi-member representative districts among the State legislatures. He states that:

> Only nine states choose all legislators in single-member elections: California, Delaware, Kansas, Kentucky, Missouri, Nebraska, New York, Rhode Island, and Wisconsin. Formerly, such states were fewer: most of the time, nonexistent.[15]
>
> Of 1,841 senate seats in 1954 only 221, a trifle over 12 per cent, are contested in multi-member ballotings. But these overall figures, lumping together 48 legislative bodies of different sizes, conceal the number, proportion, and identity of states which elect senators on a multi-member basis. There are 16 such states.
>
> If Alaska enters statehood with its present legislative forms, it will end Arizona's distinction as the only

[14] 49 American Political Science Review 1105 (1955).

[15] Id., p. 1106, last par.

state electing all senators on a multi-member schedule. Hawaii chooses just one of 15 senators in a single-member election.[16]

A panoramic view of the 48 houses (of representatives), including Nebraska's single chamber, reveals that (representatives elected by multi-member districts) add up to more than 45 per cent of the seats—2,616 of 5,762—and are distributed among three-fourths of the states. The 12 states which elect no multiple-district representatives are the nine first named above, plus Arizona, Utah, and Vermont.[17]

Among the 36 states which contain them, the 2,616 (representatives elected by multi-member districts) amount to more than 58 per cent, outnumbering nearly three to two the 1,870 representatives elected in single-member districts.[18]

Hawaii and Alaska, like three of the states, name all representatives in multiple elections.[19]

In view of these statements and other data supplied by Klain, it is clear that the paretice of combining both single and multi-member districts, or multi-member districts containing varying numbers of members, in structuring a legislative chamber, is and has been a widely prevalent practice among the States. Consequently, it is significant that none of the legislative apportionment cases and commentaries spawned by **Baker v. Carr**, of which counsel have knowledge, have condemned *per se* the employment of multi-member districts in such fashions. Rather, the attention of these courts and writers has been directed toward one basic question—whether the legislative apportionment under consideration reflects an irrational debasement of voting strength.

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[16] Id., p. 1107, 2d par.

[17] Id., p. 1108, last par.

[18] Id., p. 1109, 2d par.

[19] Id., p. 1111, 2d par.

Furthermore, federal courts have frequently approved apportionments of legislative chambers which were structured by the combination of single and multi-membered districts. **Moss v. Burkhart** (D. C.—W. D. Okl.—1963), 220 F. Supp. 149; **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601; **Nolan v. Rhodes** (D. C.—S. D. Ohio—1963), 218 F. Supp. 953. Compare: **Baker v. Carr** (D. C.—M. D. Tenn.—1963), 222 F. Supp. 684.

In **Davis v. McCarty,**[20] the Oklahoma Supreme Court had under review State laws reapportioning the bicameral Oklahoma Legislature for the purpose of determining their compliance with State constitutional formulas. The State constitution required that the State be divided into forty-four senatorial districts, "each of which shall elect one senator; and the Senate shall always be composed of forty-four senators, except that in event any county shall be entitled to three or more senators at the time of any apportionment such additional senator or senators shall be given such county in addition to the forty-four senators and the whole number to that extent."[21]

In construing this constitutional provision the Court held that "Where a county is apportioned two or more Senators because of the population factor, such senators may be elected by the voters at large in said county or from Senatorial districts therein where such districts are established according to law."[22] The Court further stated that:

> In **Jones v. Freeman** (1943), 193 Okla. 554, 146 P. 2d 564, we said that whether the additional senators from Oklahoma and Tulsa counties must be elected from separate districts within these counties, or at

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[20] Okla. Supreme Ct.—No. 40496—decided Nov. 6, 1963. The Court granted no relief in this case because of the decision in *Moss v. Burkhart* (D. C.—W. D. Okl.—1963), 220 F. Supp. 149.

[21] Okla. Const., Art. 5, Sec. 9 (a).

[22] Syllabus, 4th par.

> large by the voters of the counties, is not clear. We held that either method would be permissible, so long as substantial equality prevails. [23]

Sobel v. Adams[23] involved an action challenging the constitutionality of the Florida statute providing for a 43 senator and 112 representative legislature. In upholding the constitutionality of the statute, the three-judge court stated in part that:[24]

> The rejected constitutional amendment would have provided for 46 senators and 135 representatives. In some respects it might have advantages over the statutory plan now before us. For example, in our former opinion we thought the suggestion to give a single county more than one senator was unwise. We still have doubts as to the desirability of doing so. The statute gives two senators to Dade County. Although we would not have directed multiple senatorial representation for any county, **we certainly should not prohibit it if the state desires it. Our function begins and ends with the determination of rationality and whether there is invidious discrimination.** (Emphasis supplied.)

The office of the Secretary of State of the State of Florida advises that the two senators apportioned to Dade County will be elected county-at-large.

In view of these authorities, it is clear that the combination of single and multi-member districts within a legislative chamber does not constitute invidious discrimination **unless** it results in an unjustifiable population disparity. **Therefore, it follows that if the Georgia legislature had not districted the seven most populous counties, but had merely apportioned the proper number of senators to each, then the structuring of the Senate would have satisfied all constitutional standards.**

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[23] (D. C.—S. D. Fla.—1963), 214 F. Supp. 811.

[24] Id., p. 812, 1. col. 2d par.

Turning to the second difference referred to above, this Court may judicially know that the City of Atlanta is divided into eight wards with two aldermen from each, who are elected city-at-large,[25] and that this electorial practice epitomizes a widely prevalent method of electing municipal and county legislative bodies throughout the Nation.[26] Obviously, this method of electing representatives does not constitute invidious discrimination unless it should produce population disparities in voting strength.

Nevertheless, the Appellees have contended that the county-at-large election of senators "results in invidious discrimination against the voters in any senatorial district in Georgia which is comprised of less than an entire County because in any such district the representative chosen by the voters may be defeated by the votes of persons not residing in that district" [R. 26, see also R. 7-8 (complaint)].

This contention is untenable. Upholding it would invalidate the method of electing a vast number of aldermen in cities across the Nation, not on the basis of ward population disparities, but simply because their charters

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[25] Ga. Laws, 1952, pp. 2635-2637, Secs. 1, 3 and 4.

[26] *The Municipal Yearbook* (1963), at p. 105, fn. 2, states that: "The 55 cities which elect at-large councilman nominated by wards are: Ozark, Alabama; Tucson, Arizona; El Dorado, Arkansas; Alhambra, Compton, Long Beach, Newport Beach, Oakland, San Diego, San Leandro, Santa Ana, and Stockton, California; Greeley, Colorado; Wilmington, Delaware; Belle Glade, Bradenton, St. Petersburg, and Tampa, Florida; La-Fayette, Georgia; Lexington, Kentucky; Portland, Maine; Chelsea and Springfield, Massachusetts; Cadillac, Holland, Inkster, Jackson, and Lansing, Michigan; Columbia, Mississippi; Poplar Bluff and Springfield, Missouri; Concord, New Hampshire; Raritan, New Jersey; Niagara Falls, New York; Jacksonville, New Bern, and Rocky Mount, North Carolina; Elk City, Enid, Guymon, Midwest City, Okmulgee, and Pawhuska, Oklahoma; Springfield, Oregon; Charleston and Greer, South Carolina; Columbia, Tennessee; Dallas, Ennis, Hillsboro, Mesquite, and Nederland, Texas; Ogden, Utah; Clarkston and Sumner, Washington."

require that the candidates from the various wards run city-at-large.

One of the reasons frequently attributed for Atlanta's good government is the fact that its aldermen are elected at-large with the result that they are permitted to consider measures in the light of the interests of the City as a whole, instead of being limited by parochial viewpoints engendered by ward election. If such a method of electing aldermen is beneficial for the City of Atlanta, then why would not the same method of electing senators be beneficial for Fulton County?

If this contention of the Appellees is sound, then it would not only invalidate a technique of apportionment frequently built into state, county and municipal legislatures, but would also deprive the courts of one of their most effective remedies in eradicating legislative mal-apportionments. For example, suppose the legislature had required that Fulton's senators run only within their districts and had then drawn these district lines in such a manner as to create egregious population disparities among the districts. In eliminating this mal-apportionment, would it not be much better for the court to order a county-at-large election for the senators, rather than to undertake the making of the classic legislative judgments involved in drawing district lines? Obviously, such lines could not be drawn without affecting partisan interests.

Under the Senatorial Reapportionment Act, the seven most populous counties are divided into districts of substantially equal population. The sole purpose of this districting is to insure geographical representation of different sections of each county. The legislature could have allotted the senators to each county without districting it, but this would have permitted the election of all the senators from the same part of the county.

In our consideration of these two differences (single and multi-member districts and county-at-large elections) we have found that both are equally inoffensive to constitutional standards. Consequently, why does the joining of these two differences in structuring the Georgia Senate produce invidious discrimination?

C. The Contours of Equal Protection.

In **Baker v. Carr,**[27] the plaintiffs contended that the structure of the Tennessee legislature effected a gross disproportion of representation to voting population, and thereby placed them in a position of constitutionally unjustifiable inequality. The majority opinion of this Court concluded that the "right asserted is within the reach of judicial protection under the Fourteenth Amendment."[28]

The concurring opinion of Justice Douglas in **Baker** casts a great deal of light upon the thinking of the majority. He defined the scope of the Equal Protection Clause in the following terms:[29]

> There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?
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> The traditional test under the Equal Protection Clause has been whether a State has made "an invidious discrimination," as it does when it selects "a particular race or nationality for oppressive treatment." See **Skinner v. Oklahoma,** 316 U. S. 535,

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[27] (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 961

[28] Id., 369 U. S. 237, 2d par., 7 L. ed. 2d 697, 1. col., last par.

[29] Id., 369 U. S. 244, 4th par., 7 L. ed. 2d 701, 1. col. 4th par.

541, 86 L. ed. 1655, 1660, 62 S. Ct. 1110. Universal equality is not the test; there is room for weighting. As we stated in **Williamson v. Lee Optical of Okla., Inc.**, 348 U. S. 483, 489, 99 L. ed. 563, 573, 75 S. Ct. 461. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Justice Clark in his concurring opinion stated that:[30]

> The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House. But this might not on its face be an "invidious discrimination," **Williamson v. Lee Optical of Okla., Inc.**, 348 U. S. 483, 489, 99 L. ed. 563, 573, 75 S. Ct. 461 (1955), for a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." **McGowan v. Maryland**, 366 U. S. 420, 426, 6 L. ed. 2d 393, 399, 81 S. Ct. 1101 (1961).

And Justice Stewart in his concurring opinion stated that:[31]

> In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term—that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." **McGowan v. Maryland**, 366 U. S. 420, 425, 6 L. ed. 2d 393, 399, 81 S. Ct. 1101. In case after case arising under that Clause we have also said that "the burden of establishing the unconstitutionality of a statute rests on him who assails it." **Metropolitan Casualty Ins. Co. v. Brownell**, 294 U. S. 580, 584, 79 L. ed. 1070, 1072, 55 S. Ct. 538.

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[30] Id., 369 U. S. 253, 2d par., 7 L. ed. 2d 707, 1 col., 1st par.
[31] Id., 369 U. S. 266, 1st par., 7 L. ed. 2d 714, 1 col., 2d par.

Today's decision does not turn its back on these settled precedents.

These opinions clearly illustrate that this Court intends that the traditional tests under the Equal Protection Clause are the ones to be applied in determining the validity of state legislative apportionments. Obviously, this Court did not attempt to create any new judicial standards for courts to apply when faced with a claim of arbitrary state action in the field of legislative apportionment.

More recently in **Norvell v. Illinois**,[32] this Court had before it a case in which the petitioner was convicted of murder in a state court at a trial in 1941, in which he, though indigent, was represented by a lawyer. He was unable to obtain a transcript and did not pursue an appeal from his conviction. In 1956, the petitioner made a motion in which the trial court was requested to furnish a stenographic transcript of his trial. However, no such transcript was available due to the death of the court reporter. The state courts denied the petitioner a new trial and he filed his application for certiorari with this Court. Upon appeal, he relied upon **Griffin v. Illinois**[33] holding on the facts of that case that it was a violation of the Fourteenth Amendment to deprive a person because of his indigency of any rights of appeal afforded all other convicted defendants.

This Court granted the application for certiorari and in an opinion by Justice Douglas, expressing the views of six members of the Court, held that under the circumstances the denial of post-conviction relief to the petitioner did not violate the Due Process or Equal Protection

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[32] (1963), 373 U. S. 420, 10 L. ed. 2d 456, 83 S. Ct. 1366, reh. den., 375 U. S. 870, 11 Fed. 2d 99, 84 S. Ct. 27.

[33] 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585, 55 A. L. R. 2d 1055.

Clauses of the Fourteenth Amendment. This Court expressed its views on the scope of the Equal Protection Clause in the following terms:[34]

> As we said in **Tigner v. Texas**, 310 U. S. 141, 147, 84 L. ed. 1124, 1128, 60 S. Ct. 879, 130 A. L. R. 1321:
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> ". . . The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."
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> When, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical accommodation must be made. We repeat what was said in **Metropolis Theatre Co. v. Chicago**, 228 U. S. 61, 69, 70, 57 L. ed. 730, 734, 33 S. Ct. 441.
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> "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. . . . What is best is not always discernible; the wisdom of the choice may be disputed or condemned."
>
> The "rough accommodations" made by government do not violate the Equal Protection Clause of the Fourteenth Amendment unless the lines drawn are "hostile or invidious". **Welch v. Henry**, 305 U. S. 134, 144, 83 L. ed. 87, 92, 59 S. Ct. 121, 118 A. L. R. 1142. We can make no such condemnation here.

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[34] 373 U. S. 423, last par., 10 L. ed. 2d 459, r. col., 1st par.

And in **Hearne v. Smylie**[35], involving an attack upon the apportionment and manner of election of Idaho legislators, a three-judge district court held that:[36]

> So we treat with plaintiffs' contention that Idaho's apportionment method defies the mandate of the Fourteenth Amendment's "equal protection" clause. As Mr. Justice Van Devanter wrote for a unanimous Court in **Lindsley v. Natural Carbonic Gas Co.**, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911):
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> "The rules by which this contention [violation of equal protection] must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify • • • but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." [220 U. S. at 78-79, 31 S. Ct. at 340, 55 L. Ed. 369; see also, **Morey v. Doud**, 354 U. S. 457, 463-466, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).]
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> Recently the Court has restated these rules by declaring succinctly that a "statutory discrimina-

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[35] (D. C.—D. Idaho—1964), 225 F. Supp. 645.

[36] Id., p. 650, l. col., 3d par.

tion will not be set aside if any state of facts reasonably may be conceived to justify it". [**McGowan v. Maryland**, 366 U. S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961).]

In **McGowan v. Maryland**, 366 U. S. 420, 425-426, 81 S. Ct. 1101, 1104-1105, 6 L. Ed. 2d 393, in referring to the question as to whether under the circumstances of that case charging that certain provisions of the state statute were arbitrary and capricious, this Court said:

> The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. **A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.** (Emphasis added.)

In 1931 the late Mr. Justice Holmes, speaking for this Court in **Bain Peanut Co. v. Pinson**, 282 U. S. 499, 501, 51 S. Ct. 228, 229, 75 L. Ed. 482, said: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."[37]

In **Moss v. Burkhart**,[37] the district court reapportioned the Oklahoma legislature by judicial decree. The decree apportioned the senators among the various counties according to population and concluded with the proviso[38]

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[37] (D. C.—W. D. Okl.—July 17, 1963), 220 F. Supp. 149.

[38] Id., p. 157, 1 col., last par.

that "until the Legislature, as apportioned hereunder, shall by appropriate legislation prescribe the boundaries of the Districts, within any one County of the State entitled to elect more than one Senator, under the provisions of this Order, the candidates for such senatorial offices shall be nominated and elected at large within such Counties". The decree apportioned the representatives in the same manner and again concluded with the proviso[39] that "until the Legislature, as apportioned hereunder, shall by appropriate legislation prescribe the boundaries of the Districts, within any one County of the State entitled to elect more than one Representative, under the provisions of this Order, the candidates for such representative office shall be nominated and elected at large within such Counties".

Obviously, the decree did not place the reapportioned legislature under any affirmative duty to district the counties having plural representation. Therefore, the court in effect upheld the same method of electing representatives which is attacked in this action.

Furthermore, the latest **Baker v. Carr** district court decision[40] impliedly upholds the at-large election of senators in the counties assigned plural senatorial representation. The senate committee justified this method of election in the following terms:[41]

> "The Tennessee Constitution forbids that any county shall be divided in forming a senatorial district. As a practical matter this means that every voter in Shelby County will be entitled to vote for and participate in the election of **five** senators; and the voter in Davidson County in the election of three senators. This provision assures to the voters in such

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[39] Id., p. 160, l. col., 1st par.

[40] (D. C.—M. D. Tenn.—Oct. 10, 1963), 222 F. Supp. 684

[41] Id., p. 689, l. col., last par.

> counties the practical opportunity to exert greater political weight by the election of a slate or ticket backed by a political organization and both supported and publicized by a metropolitan press. The voter in a multi-county district has no such opportunity.

Jones v. Freeman,[42] involved a mandamus action to test the validity of various Oklahoma legislative apportionment acts under the then state constitution which required that the senatorial districts shall "contain as near as may be an equal number of inhabitants".[43] In its opinion, the Court stated that:[44]

> Upon the question of whether the two additional Senators from Oklahoma County and the one additional Senator from Tulsa County must come from separate districts or may be elected from other districts or at large by the voters of the counties, the Constitution is not clear. Either method would be permissible, so long as substantial equality prevails.

See also: **Preisler v. Doherty** (1955), 365 Mo. 469, 284 S. W. 2d 427 (11); **Graham v. Special Commissioners of Suffolk County** (1940), 306 Mass. 237, 27 N. E. 2d 995, 999, r. col., 1st par.; **Brophy v. Suffolk County Apportionment Com'rs** (1916), 225 Mass. 124, 113 N. E. 1040; and **Daniel v. Davis** (D. C.—E. D. La.—1963), 220 F. Supp. 601, 602, r. col., last par.

In view of these authorities, it is clear that the State is to be allowed every reasonable latitude in the field of legislative apportionment, and any device therein will not be set aside if any state of facts reasonably may be conceived to justify it.

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[42] (1944); 193 Okla. 554, 146 P. 2d 564, app. dism. 322 U. S. 717, 88 L. ed. 1558, 64 S. Ct. 1288.

[43] Id., 146 P. 2d 567, r. col., 1st par.

[44] Id., 146 P. 2d 574 (17).

D. The Presumption of Constitutionality.

In **W. M. C. A., Inc. v. Simon,**[45] the New York legislative apportionment case, the district court held that:[46]

> The principle that there is a presumption in favor of the constitutionality of a statute and the principle that a violation must be clear before a federal court of equity will lend its power to the disruption of the state election processes (**Sanders v. Gray,** D. C. N. D. Ga. 1962, 203 F. Supp. 158, 170) have been re-enunciated in apportionment decisions rendered since the **Baker v. Carr** determination.
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> 1. In **Caesar v. Williams,** Supreme Court of the State of Idaho, April 3, 1962, 371 P. 2d 241, 9 Idaho Capital Report 161, McFadden, J., wrote:
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> "In considering the question of the constitutionality of these acts, certain fundamental rules at all times must be kept in mind. The burden of showing the unconstitutionality of a statute is upon the party asserting it. **Eberle v. Nielson,** 78 Idaho 572, 306 P. 2d 1083; **Rich v. Williams,** 81 Idaho 311, 341 P. 2d 432. This court is without power to invalidate or nullify a constitutional act of the legislature; if the legislature does not clearly violate the Constitution, this court must and will uphold it. **Padgett v. Williams,** 82 Idaho 114, 350 P. 2d 353. Every reasonable presumption must be indulged in favor of the constitutionality of a statute. **Robinson v. Enking,** 58 Idaho 24, 69 P. 2d 603; **Idaho Gold Dredging Co. v. Balderston,** 58 Idaho 692, 78 P. 2d 105." (9 Idaho Capital Report 161 at 164.)
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> 2. In **Maryland Committee for Fair Representation v. Tawes,** Md. Cir. Ct., Anne Arundel County, May 24, 1962, Md., Judge Duckett wrote in part:

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[45] (D. C.—S. D. N. Y.—1962), 208 F. Supp. 368.

[46] Id., at p. 373, r. col.

> "Every intendment must be resolved in favor of constitutionality and the burden of showing unconstitutionality is on the petitioners"

citing **McGowan v. Maryland**, 366 U. S. 420-426, 81 S. Ct. 1101, 6 L. Ed. 2d 393; **John Hopkins University v. Williams**, 199 Md. 382, 86 A. 2d 892; **Norris v. Baltimore**, 172 Md. 667, 192 A. 531.

3. In **Toombs v. Fortson**, D. C. N. D. Ga. 1962, 205 F. Supp. 248, 256, the Statutory Court stated:

> "* * * there is an additional factor of importance when the Federal Court is called upon to invalidate solemnly enacted State constitutions and laws. Bearing in mind the plain lesson laid down by the Supreme Court repeatedly that an **alleged violation of constitutional rights by the State must be clear** before a Federal Court of equity will lend its power to the disruption of the State election processes * * *." (Emphasis inserted.)

To the same effect see: **Davis v. Synhorst** (D. C.—S. D. Iowa—1963), 217 F. Supp. 492, at 497, r. col., 2d par.; **Clark v. Carter** (D. C.—E. D. Ky.—1963), 218 F. Supp. 448, at p. 451 (2); and **Lisco v. McNichols** (D. C.—D. Col. —1962), 208 F. Supp. 471, at p. 477, r. col., last par.

E. The Rationality of County-at-Large Elections.

Historically, the counties of Georgia are the basic units of representation and local government.[47] Georgia, since earliest times, has consistently emphasized county govern-

[47] See *Sanders v. Gray* (D. C.—N. D. Ga.—1962), 203 F. Supp. 158, at pp. 161-163. The following cases recognize that the historical basis of counties is an important factor to consider in making the test as to whether invidious discrimination exists in legislative apportionment: *Davis v. Synhorst* (D. C.—S. D. Iowa—1963), *W. M. C. A., Inc. v. Simon* (D. C.—S. D. N. Y.—1962), 208 F. Supp. 368, at pp. 374, r. col., 3d par., 376, l. col., 4th par.

ment and the county unitary approach. A county is a political subdivision of the State, created for administrative purposes, is representative of the sovereignty of the State and auxiliary to it. Its functions are of a public nature; it is political in character, and constitutes the machinery by and through which many of the powers of the State are exercised.[48] Consequently, the operations of county government over a period of years produces a degree of solidarity from economic, social and political causes. In other words, a county generally reflects a fairly solid unit of political thinking.

In view of these considerations, it is a rational and intelligible objective for the State to seek to preserve the political integrity of counties in the representation of interests in the General Assembly. The same advantages experienced by a multi-ward city whose aldermen run city-at-large, are also experienced by a multi-district county whose senators run county-at-large. These advantages to the city are well described in the following excerpt:[49]

> The election of councilmen by wards under normal conditions has certain obvious advantages. First, it gives the voter in the council election a short and simple ballot. Second, it gives him the opportunity of selecting someone living near him about whom it should be possible to get personal information. Third, insofar as the wards have peculiar and special interests, it provides means for their representation in the council.
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> The people in the United States have in recent years been inclined to give more weight to the argu-

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[48] Compare: *Sobel v. Adams* (D. C.—S. D. Fla.—1962), 208 F. Supp. 316, at p. 322, 1. col.; 6 *E. G. L.*, Counties, Sec. 2, p. 522.

[49] *American City Government* (1950—Revised Ed.), by Anderson and Weidner, pp. 404-406. See also *Governing Urban America* (1955), by Charles R. Adrian, p. 233.

ments against the ward system than to those in its favor. Residence within the ward has come to be almost everywhere a prerequisite to election from the ward.

Considering the manner in which people in cities draw themselves apart from each other for residence purposes, it is not surprising that some wards are left without adequate aldermanic material. Even the labor leaders may chance to be grouped all in one ward, and some of them may be in wards where they have no chance of election. The result is often a narrow restriction of the range of choice and in some wards the election to the council of men not up to the general standard. Furthermore, the basis upon which selection is made within the ward tends to be that of service to the ward instead of ability to serve the city. A ward alderman is expected to get something for his ward—some street improvement or a public building or at least work and help for needy constituents. If he must indulge in logrolling to get results, his action will be condoned by his constituents, whereas to come home with "clean but empty hands" is considered a proof of weakness in aldermen as well as in ambassadors. It scarcely needs to be said that many of the men who engage in such a scramble for spoils and ward improvements are a distinctive type whose presence in the council in large numbers is almost certain to give it a low moral tone.

The ward system gives very unequal results in the matter of representation. If the city be gerrymandered —and it is likely to be—then one of the parties is reasonably sure to be under-represented or at least to feel that it is. Even where the original ward lines are made carefully and honestly, the rapid shifting and growth of population in cities soon upsets the entire division of representation. Once established, however, and even when there was little reason for them in the first in-

stance, ward lines tend to become fixed, almost unchangeable. It is not uncommon, therefore, to find cases of minority rule continued for years and even decades.

Other defects can easily be found. Ward lines are not, as a rule, the natural boundaries of distinct geographical areas or social groups but rather artificial or merely traditional limits. The aldermen elected from wards are never responsible to the city as a whole. Certain groups that have respectable numbers of voters but not enough to carry any ward may find themselves wholly unrepresented or very poorly represented by some fusion candidate. Indeed under the ordinary system of voting, even if the wards are all practically equal in population, the ward system of election may result in anything from absolute dominance of the council by a plurality party to a fair apportionment of representation among all groups and parties. To control the council a party needs only to carry a majority of the wards, and this it may do by a bare majority or plurality in each ward as the case may be.

Let us suppose a simple case of five wards, substantially equal, and only two parties, one of which is, however, handicapped by having a concentration of its voting power in one ward, which is not an uncommon case (see Table 24). The illustration here given may be considered an extreme case, but such cases are not entirely imaginary.

Table 24. A sample election by wards.

	Ward 1	Ward 2	Ward 3	Ward 4	Ward 5
Party A vote	6,200	6,300	6,500	6,400	3,000
Party B vote	5,800	5,700	5,500	5,600	9,000
Aldermen elected	A	A	A	A	B

Total vote, both parties, 60,000 ..... 100%
Total A vote, 28,400 ..... 47⅓%
Total B vote, 31,600 ..... 52⅔%
A members in council number 4, or 80 percent of total.
B members in council number 1, or 20 percent of total.
7,100 votes elected each A member; 31,600 votes succeed in electing only one B member.

The assumption behind the ward system of representation is that men are best represented on the basis of the geographical areas in which they live. Such an assumption is less true today than it ever was. In a mobile and diversified population, men divide in a variety of ways—on the basis of their occupation, the level of their incomes, their religion, their racial and ethnic characteristics, their philosophies, their parties. A geographical factor may be added to this list, but it is only one of many items of importance, and it does not wholly conform to any of the others. If councilmen are elected at large, especially if by proportional representation, groups of voters do not have to rely upon geographical concentration of strength in order to assure themselves of representation.

Election at large—By the election of councilmen at large a city gains certain obvious advantages. Ward boundaries are for all practical purposes wiped out. Gerrymandering becomes impossible. The parties or other groups may put forward their best men, no matter where they live in the city. Being elected from and responsible to the city as a whole, the councilmen must put more stress upon general city-wide problems both in the campaign and in office than upon the special needs of little districts. Furthermore, when elected at large the council practically must be a small body. There is reason to believe, therefore, that somewhat abler men will be chosen.

By an Act approved September 24, 1959 (Pub. Law 86-380, 73 Stat. at L. 703), the Congress established an Advisory Commission on Intergovernmental Relations and assigned it the duties, *inter alia*, of encouraging discussion and study at an early stage of emerging public problems that are likely to require intergovernmental cooperation and of recommending, within the framework of the Constitution, the most desirable allocation of governmen-

tal functions, responsibilities, and revenues among the several levels of government.

On December 13, 1962, the Commission issued its Report entitled "Apportionment of State Legislatures",[50] which included the recommendation, *inter alia*, that "'Equal protection of the laws' would seem to presume, and considerations of political equity demand, that the apportionment of both houses in the State legislature, be based strictly on population."[51] Although the Commission is population oriented in apportionment matters, it nevertheless recognizes the value of preserving the territorial integrity of a county in districting. For instance, the Commission included within its conclusions and recommendations the following statement:

> Only one procedure has been developed that can eliminate the problem of drawing district lines. This procedure would base representation permanently on political subdivisions or on geographic areas which may or may not take population into consideration. Population may be a factor by permitting those units with larger populations to elect more than one legislator but by requiring all such legislators to be elected at large. Thus, the need to draw district lines after each apportionment is eliminated.

Furthermore, federal courts have frequently approved districting plans which utilized county lines. **Moss v. Burkhart** (D. C.—W. D. Okla., 1963), 220 F. Supp. 149; **Daniel v. Davis** (D. C.—E. D. La., 1963), 220 F. Supp. 601; **Nolan v. Rhodes** (D. C.—S. D. Ohio, 1963), 218 F. Supp. 953. Compare: **Baker v. Carr** (D. C.—M. D. Tenn., 1963), 222 F. Supp. 684.

These considerations clearly demonstrate that requiring at-large elections in multi-district counties is a ra-

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[50] U. S. Government Printing Office, Washington 25, D. C.

[51] Id., p. 67, 2d par.

tional and reasonable legislative objective which is not precluded by the Equal Protection Clause. The question before the Court is not whether this requirement is wise or unwise, but simply whether it is invidiously discriminatory. Manifestly, the requirement reflects a rational policy fully consistent with the principles of the Equal Protection Clause. The Court should be loath to discard an operative system of government on the basis of the vague and untenable contentions of invidious discrimination advocated by the Appellees.

F. The Solemnity of the Challenged Enactment.

Soon after the enactment of the State Senatorial Reapportionment Act on October 5, 1962, doubt arose as to whether the Georgia Constitution permitted the Senators from the multi-district counties to be elected county-at-large.[52] In order to eliminate any question as to the validity of such at-large elections, the General Assembly adopted a Resolution[53] proposing an Amendment to the Constitution whose chief significance was to expressly authorize and ratify this method of election. The proposal was submitted to the people at the 1962 General Election as a separate and distinct measure which was voted upon individually. If the people had rejected such proposal then the apportionment of the Senate according to population would not have been affected, except to the extent that the Georgia courts might finally have determined under the State Constitution that the Senators from the multi-district counties would have to be elected within their respective districts. Obviously, no catastrophe would have befallen the people had they rejected the proposed Amendment. Nevertheless, the people ratified the Amendment by a vote of 119,502 for

[52] See *Finch v. Gray* (Fulton Superior Ct.—No. A 96441) and in particular the Orders of October 20 and 30, 1962.

[53] Ga. Laws, Sept.-Oct. 1962, Extra Sess., pp. 51-52.

and 75,598 against. The Amendment carried in each of the multi-district counties except Bibb.

Ratification of a constitutional provision by the people is the most solemn form of political enactment. In **Lisco v. Love,**[54] involving a Colorado legislative apportionment suit, a three-judge district court analyzed the sanctity of the people's choice in the following terms:[55]

> The initiative gives the people of a state no power to adopt a constitutional amendment which violates the Federal Constitution. Amendment No. 7 is not valid just because the people voted for it. If the republican form of government principle is not a useable standard because it poses political rather than judicial questions, the observation is still pertinent that Amendment No. 7 does not offend such principle. If the true test is the denial of equal right to due process, we face the traditional and recognized criteria of equal protection. These are arbitrariness, discrimination, and lack of rationality. The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary.
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> The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. At the most they present a political issue which they

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[54] (D. C.—D. Col.—1963), 219 F. Supp. 922.

[55] Id., p. 932, r. col., 3d par.

lost. On the questions before us we shall not substitute any views which we may have for the decision of the electorate. In **Ferguson, Attorney General of Kansas v. Skrupa**, 372 U. S. 726, 731, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93, the Supreme Court said that it refused to sit as a "super-legislature to weigh the wisdom of legislation." Similarly, we decline to act as a superelectorate to weigh the rationality of a method of legislative apportionment adopted by a decisive vote of the people.

We believe that no constitutional question arises as to the actual, substantive nature of apportionment if the popular will has expressed itself. In **Baker v. Carr** the situation was such that an adequate expression of the popular view was impossible. In Colorado the liberal provisions for initiation of constitutional amendments permit the people to act—and they have done so. If they become dissatisfied with what they have done, a workable method of change is available. The people are free, within the framework of the Federal Constitution, to establish the governmental forms which they desire and when they have acted the courts should not enter the political wars to determine the rationality of such action.

The preference of the people of Georgia for the Senators from the multi-district counties to be elected county-at-large, as expressed by constitutional ratification, negates the presence of invidious discrimination. Compare: **Davis v. Synhorst** (D. C.—S. D. Iowa—1963), 217 F. Supp. 492, at p. 498, r. col., 1st par.; **W. M. C. A., Inc. v. Simon** (D. C.—S. D. N. Y.—1962), 208 F. Supp. 368, at pp. 374, r. col., 3d par., 379, r. col., 1st par.; and **Toombs v. Fortson** (D. C.—N. D. Ga.—1962), 205 F. Supp. 248, at p. 256, 1 col., 2d par.

G. The Availability of an Adequate and Untried Political Remedy.

One of the curious aspects of this case is the fact that the Appellees, one of whom is a State senator, have made no effort to pass legislation at either the 1963 or 1964 Regular Sessions of the General Assembly to amend the State Senatorial Reapportionment Act so as to require senators in multi-district counties to be elected within their respective districts. The chance of such legislation being adopted would appear to be quite good because it would only affect seven counties and there apparently would be no urban-rural conflict over such an amendment. This likelihood was recognized by Circuit Judge Bell at the hearing held before the District Court on March 17, 1964. The Judge stated that "I have no doubt this statute would be changed in the Legislature if somebody would get over there and make some effort to do it" (R. 97).

The availability of an adequate political remedy is generally accorded great weight in determining whether relief should be granted under the Equal Protection Clause. Compare: Concurring opinion of Justice Clark in **Baker v. Carr** (1962), 369 U. S. 258, last par., 7 L. ed. 2d 709, l. col., last par.; **Davis v. Synhorst** (D. C.—S. D. Iowa—1963), 217 F. Supp. 492, at pp. 498, l. col., last par., 504, l. col.; **Lisco v. Love** (D. C.—D. Col.—1963), 219 F. Supp. 922, at p. 933, l. col., 2d par.; **W. M. C. A., Inc., v. Simon** (D. C.—S. D. N. Y.—1962), 208 F. Supp. 368, at pp. 374, r. col., 3d par., 378, l. col., last par.; **Sanders v. Gray** (D. C.—N. D. Ga.—1962), 203 F. Supp. 158, at p. 169, r. col., last par.; **Toombs v. Fortson** (D. C.—N. D. Ga.—1962), 205 F. Supp. 248, at p. 255, r. col., last par.; and **Nolan v. Rhodes** (D. C.—S. D. Ohio—1963), 218 F. Supp. 953, at p. 958, l. col., 1st par.

Irrespective of these authorities, the District Court determined that the decision of this Court in **Wesberry v. Sanders,**[56] had abolished the rule that a court should deny relief in legislative apportionment matters where an adequate political remedy exists. The Appellant believes that the District Court has misconstrued **Wesberry** in this respect. In **Wesberry**, the plaintiffs vigorously contended that any chance for political relief was remote because of the long-standing inaction of Congress in this matter and because the Georgia House of Representatives was under rural domination. Comments from the Bench during oral argument indicated that several Justices agreed with this contention.

By contrast, political relief in this case is clearly available because only seven counties are directly involved and it appears unlikely that there would be any serious opposition to an amendment to require senatorial candidates to run district-wide in these counties. Furthermore, one of the Appellees is a State senator who has made no effort whatsoever to exercise his legislative remedy.

In **Spahos v. Mayor and Councilmen of the Town of Savannah Beach**[57] the plaintiffs challenged under the Equal Protection Clause the constitutionality of state statutes permitting non-resident real property owners of the municipality who reside in Chatham County to vote in the elections of the municipality along with residents who may or may not own real property, and providing that three of the town councilmen shall be elected from that class of voters who reside in Chatham County outside the corporate limits of the municipality. The district court dismissed the complaint for a want of equity and in so doing held, *inter alia*, that:[58]

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[56] (1964), 376 U. S. 1, 11 L. ed. 481.

[57] (D. C.—S. D. Ga.—1962), 207 F. Supp. 688.

[58] Id., p. 691, r. col., 4th par.

This is for the reason that the case of plaintiffs is fatally deficient in two other respects. First, the "strangle hold" situation present in **Baker v. Carr**, which we view as the *sine quo non* of that decision is not present here. The plaintiffs there had been unable through the course of many years to obtain what the Tennessee Constitution guaranteed them. No state constitutional guaranty against such non-resident voters is present here.

Plaintiffs assert rights under, and discrimination proscribed by, the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Political rights, such as the right to vote, are protected by the equal protection clause. **Baker v. Carr**, supra; **Sanders v. Gray**, supra. But discrimination must reach the point of invidiousness to become actionable, and here the discrimination, if there is discrimination on the theory of allowing non-residents to vote in the municipality along with residents, when such is not done in other municipalities within Chatham County or within Georgia, is not invidious if there is a reasonable chance that political relief can be obtained. The legislative history heretofore set out amply demonstrates that there is. In fact, complete relief was obtained under the 1947 Act. Furthermore, there is no proof that the assistance of the mayor and council who could intercede with the Chatham County legislative delegation, has been sought. There is no "strangle hold" here within the meaning of **Baker v. Carr**. . . .

Admittedly the desired end may be obtained in less time through the judicial process but the courts are not empowered to grant dispensations normally forthcoming through the legislative process. Courts can only do the minimal necessary to accord constitutional rights where they are being withheld, and then only on clear proof that they may not be otherwise obtained.

The plaintiffs in **Spahos** then appealed to this Court and on December 10, 1962, it affirmed the lower court in a *per curiam* opinion.[59] **The same Justices that unanimously affirmed Spahos are still on the Bench today.**

A corollary to the rule expressed by **Spahos** is the theory that a state has not acted irrationally or invidiously where it has provided an adequate political remedy for the correction of the alleged grievance.[60]

Consistent with this rationale, Justice William O. Douglas, in his book, "We, the Judges" (1956), made the following observations:

> Political action is another method of deciding certain controversies. Not all victories for human rights have been won in the courts. In the Western world, more such victories have probably been won in constitutional conventions or legislative halls than in courts of law. The remedy for unwise, improvident legislation is at the polls. Political action is, indeed, a versatile remedy for the correction of injustices. (Page 56, 2d par.)
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> . . . Litigation is not the cure-all, the solution for every conflict. If all our disputes and differences had

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[59] 371 U. S. 206, 9 L. ed. 2d 269, 83 S. Ct. 304. Compare: *Pobo v. Mayor and Councilmen of the Town of Savannah Beach* (1960), 216 Ga. 12, 114 S. E. 2d 374, aff'd (1960), 364 U. S. 400, 5 L. ed. 2d 185, 81 S. Ct. 181.

[60] "Whether the state affords the people another reasonable remedy.—Even if the malapportionment is gross, it may well not violate the Fourteenth Amendment if the state, unlike Tennessee, affords its people an alternative remedy. For example, the majority cannot complain too seriously about their underrepresentation in the state legislature in a state which provides for referenda initiated by a reasonable number of voters. Under such a system, the majority can reapportion the legislature itself. . . . But if the state provides a feasible political remedy, it might be concluded that the state has not been so arbitrary as to violate the Fourteenth Amendment." Brief for the United States as Amicus Curiae, filed May 14, 1961, in *Baker v. Carr*, Transcripts of Records and File Copies of Briefs 1961), Vol. 31, Part 2, p. 68.

> to go to the courts, we would indeed be bogged down in time-consuming, wasteful procedures. Important as courts are, necessary as law is, litigation serves only a limited function. Room must be left for the workings of other conciliatory, mediating, and directive influences. (Page 56, 4th par.)

In **Williamson v. Lee Optical of Oklahoma,**[61] this Court, in an opinion by Justice Douglas speaking for eight members of the Court, upheld the constitutionality of a state statute dealing with the regulation of visual care. The Court held in part that:[62]

> We emphasize again what Chief Justice Waite said in **Munn v. Illinois**, 94 U. S. 113, 134, 24 L. ed. 77, 87, "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

In **Minersville School District v. Gobitis,**[63] this Court, in an opinion by Justice Frankfurter speaking for seven members of the Court, upheld, against constitutional attack, the power of public school authorities to require their pupils to salute the National Flag and to recite the pledge of allegiance thereto. The opinion of the Court concluded with the following admonition:[64]

> Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply cherished liberties. See **Missouri, K. & T. Ry. Co. v. May**, 194 U. S. 267, 270. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of

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[61] (1955), 348 U. S. 483, 99 L. ed. 563, 75 S. Ct. 461.

[62] Id., 348 U. S. 487, 3d par., 99 L. ed. 572, r. col., 2d par.

[63] (1940), 310 U. S. 586, 84 L. ed. 1375.

[64] Id., 310 U. S. 600, last par., 84 L. ed. 1382, l. col., last par.

foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.'

Another reflection of this rationale is strongly established in the equitable abstention cases. Compare: **Great Lakes Dredge & Dock Company v. Huffman** (1943), 319 U. S. 293, 87 L. ed. 1407, 63 S. Ct. 1070; **Martin v. Creasy** (1959), 360 U. S. 219, 3 L. ed. 2d 1186, 79 S. Ct. 1034; **Railroad Com. v. Pullman Co.**, 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643; **Harrison v. NAACP** (1959), 360 U. S. 167, 176, 2d par., 3 L. ed. 2d 1152, 1158, l. col., 2d par., 79 S. Ct. 1025; **Louisiana Power & Light Co. v. City of Thibodaux** (1959), 360 U. S. 25, 27, 1st par., 3 L. ed. 2d 1058, 1061, l. col., last par., 79 S. Ct. 1070, reh. den. (1959), 360 U. S. 940, 3 L. ed. 2d 1552, 79 S. Ct. 1442; **City of Meridian v. Southern Bell Tel. & Tel. Co.** (1959), 358 U. S. 639, 640, last par., 3 L. ed. 2d 562, 563, r. col., 2d par., 79 S. Ct. 455; **Albertson v. Millard** (1953), 345 U. S. 242, 245, 2d par., 97 L. ed. 983, 985, r. col., 3d par., 73 S. Ct. 600; **Burford v. Sun Oil Co.** (1943), 319 U. S. 315, 317, last par., 87 L. ed. 1424, 1426, l. col., 2d par., 63 S. Ct. 1098, reh. den. (1943), 320 U. S. 214, 87 L. ed. 1851, 63 S. Ct. 1442; **Beal v. Missouri Pacific Railroad Corp.** (1941), 312 U. S. 45, 50, 1st par., 85 L. ed. 577, 580, l. col., 1st par., 61 S. Ct. 418; and **Giovanni v. Camden Fire Insurance Assn.** (1935), 296 U. S. 64, 73, last par., 80 L. ed. 47, 53, r. col., last par., 56 S. Ct. 1. See also Justice Clark's concurring opinion in **Baker v. Carr**, 369 U. S. 258, last par.

These authorities reflect a sound and salutary policy derived from our federalism for the purpose of maintaining a balanced and harmonious relationship between

federal and state authority. The considerations that prevailed in these cases for avoiding the hazards of needless friction between federal and state authority are all the more appropriate in this case where there is a strong likelihood that the issues will be resolved by state legislative action.

II. Rigidity in Legislative Apportionment Should Be Avoided.

American democratic government is still in the process of evolution, the latest seismic development of which has been **Baker v. Carr.** The state legislatures have frequently been recognized in their role as "testing laboratories" of the governmental process, whereby innovation and experiment may be undertaken and later retained or rejected as the results dictate. Obviously, there is still much to be learned and many improvements possible in the application of the theory of representative government. Political scientists are presently studying systems of proportional representation,[65] cumulative voting,[66] limited vot-

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[65] A system of elections for legislative bodies in which an attempt is made to secure the representation of all parties or points of view in approximately the same proportions as their supporters exist in the district. Provision is made for several representatives per district, and for securing representation for minorities. The *Model State Constitution*, drafted in 1948 by the Committee on State Government of the National Municipal League, calls for a single legislative chamber elected by proportional representation from districts of compact and contiguous territory, "from each of which there shall be elected from three to seven members, in accordance with the population of the respective districts." See also: Phillip, *State and Local Government in America* (1954), p. 145, 3d par., p. 422, 4th par.; Brinkley and Moos, *A Grammar of American Politics* (2d ed.—1952), p. 964, last par.; and Clarence Gilbert Hoag and George Hallett, Jr., "Proportional Representation", New York, The Macmillan Company (1926).

[66] A system of representation in which the voter elects several members of a legislative body. He is given as many votes as there are seats to be filled, and can distribute his votes as he pleases, giving them all to one candidate if he so desires. See Phillip, *State and Local Government in America* (1954), p. 144, last par., p. 422, 3d par.; and George S. Clair, "Cumulative Voting", Urbana, University of Illinois Press (1960).

ing,[87] and weighted voting.[88] Furthermore, the Senate of New Hampshire is apportioned according to "direct taxes" paid. In commenting upon this unique formula of apportionment, Gordon E. Baker states that:[89]

> New Hampshire is the only state which has carried the principle of "no taxation without representation" to its ultimate conclusion. Its Senate districts are determined "by the proportion of direct taxes paid by the said districts." Districts were last established in 1915 and undoubtedly need revising, although curiously enough, the old tax apportionment is not too far removed from what a 1950 population standard would yield, and urban areas are not under-represented. The three largest cities, with 27 per cent of the state's population, elect an average of seven out of 24 senators. It is likely that taxes paid in any state generally correlate with the degree of urbanism.

The apportionment of the New Hampshire Senate has been recently upheld in **Levitt v. Maynard** (N. H. Supreme Ct.—1962), 182 A. 2d 897.

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[87] A system wherein a voter may not vote for the full number of legislative seats to be filled in a district, thereby assuring in most cases that the minority party will elect some representatives. Phillip, *State and Local Government in America* (1954), p. 145, 2d par.; p. 422, 2d par.

[88] A system in which a representative's vote is weighted according to the population of his district, number of actual votes cast for him, or other standard selected for weighting. See: Report, "Apportionment of State Legislatures", *Advisory Commission on Intergovernmental Relations* (Dec. 1962), p. 31, last par.; Gordon E. Baker, *State Constitutions: Reapportionment* (*National Municipal League*, 1960), pp. 33-34; Robert H. Engle, "Weighting Legislators' Votes to Equalize Representation," Western Political Quarterly, 12:442 (1959); Gus Tyler, "What is Representative Government," *The New Republic* (July 16, 1962), p. 18.

[89] Gordon E. Baker, "State Constitutions: Reapportionment" (1960), *National Municipal League*, p. 12, 4th par. See also: Report, "Apportionment of State Legislatures", *Advisory Commission on Intergovernmental Relations* (Dec. 1962), p. 33, last par.

These considerations coupled with the lessons of history demonstrate that the institutions of representative government will continue to be confronted with changing conditions, circumstances and problems. This fact of history argues strongly for the enunciation of fundamental governing standards in terms sufficiently broad to assure that the essence of any given standard will be preserved when applied in a climate of circumstances not anticipated at the moment of authorship. Absolute rigidity should be avoided. Yet, the Appellees in this case attempt to invoke a rigid interpretation of the Equal Protection Clause by attacking the requirement of at-large elections for senators from the multi-district counties, while conceding that such counties have been apportioned their fair share of senators according to population. This contention has no more merit than one seeking to force a state to adopt a system of proportional representation, cumulative voting or limited voting, in order to afford an opportunity for a minority party to elect its own representative. Obviously, such contentions are unsound today, and if adopted, could not withstand the test of time.

Even a cursory look across the Nation, reveals a vast variety of technique in the apportioning and districting of state, county and municipal legislative bodies. The increased emphasis and study now being given these matters promises a rapid proliferation of new techniques in this area. In the face of these present circumstances and impending changes, the courts cannot afford to shackle this development and experimentation with such rigidity as is advocated by the Appellees, but rather the courts should rely on broad formulas designed solely to prohibit unconstitutional debasement of voting strength.

A further example of this variety is found in **Blaikie v. Powers.**[70] The court held in this case that the New York

[70] (1963), 13 N. Y. 2d 134; 243 N. Y. S. 2d 185

City charter provision establishing limited voting by which each voter can vote for only one of the two candidates for office of councilman at-large from his borough, which is entitled to two councilmen at-large, does not violate the Equal Protection Clause. A dissenting opinion was filed in this case which relied in part on the "one man-one vote" formula stated in **Gray v. Sanders** (372 U. S. 368).

On appeal to this Court, the plaintiffs presented the following question:

> Does New York City Charter provision violate Fourteenth Amendment's Due Process and Equal Protection Clauses by disenfranchising electorate and diluting, restricting, and limiting their votes by denying them right to cast their ballots and have their votes counted for all elective offices, and by denying political organizations and their members right to nominate and elect candidates to fill all public offices (32 L. W. 3229).

Nevertheless, on January 13, 1964, this Court in a *per curiam* opinion granted the motion to dismiss for want of a substantial federal question. 32 L. W. 3254.

There is no invidious discrimination in this case because there is no dilution of voting strength. Each voter in Georgia has a substantially equal voice in the election of State senators irrespective of the fact that there is a variation in the structure of constituencies because of the employment of a single and multi-member districts. This case presents nothing more than a political debate which addresses itself to the legislature.

CONCLUSION.

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, and, hence, this Court should enter an order noting probable jurisdiction.

Respectfully submitted,

EUGENE COOK,
The Attorney General.

PAUL RODGERS,
Assistant Attorney General,
Counsel for Appellant.

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June 11, 1964.

APPENDIX.

United States District Court.

Northern District of Georgia,
Atlanta Division.

James W. Dorsey, Dan I. MacIntyre, III and James Edward Manget,
Plaintiffs,

v.

Ben W. Fortson, Jr., as Secretary of State of Georgia; Eugene Gunby, Ordinary, of Fulton County; and Katherine E. Mann, Ordinary, of DeKalb County,
Defendants.

Civil Action.
No. 8756.

Before Bell, Circuit Judge, and Hooper and Morgan, District Judges Per Curiam:

Plaintiffs, respectively, a registered voter from the 40th Senatorial District of Georgia, located in Fulton County; the State Senator who is also a registered voter from the same district; and a registered voter from the 42nd Senatorial District of Georgia, located in DeKalb County, seek relief, both declaratory and injunctive, from the force of the Georgia statute which requires countywide voting in the selection of state senators in counties having plural senatorial districts. Ga. Laws, Extraordinary Session, September-October, 1962, p. 7 et seq., § 9. The defendants are the election officials, respectively, for the State of Georgia, Fulton and DeKalb Counties.

The complaint is premised on a claim of violation of rights afforded under the equal protection clause of the Fourteenth Amendment. This rests on alleged discrimina-

tory treatment of plaintiffs in the debasement of their right to vote for a senator from their own district in that they must join with voters from other districts in the selection process, while voters residing in counties forming, either in whole or part, single senatorial districts are accorded the right to select their senators on a district-wide basis. They assert, for themselves and those in the same class, that the statutory effect is to place the selection of the senator from any district in a plural district county in the hands of voters other than those residing in the district.

The constitutionality of a state statute being involved in the context of a substantial question, a Three-Judge District Court was convened pursuant to 28 U. S. C. A., § 2281. **Gray v. Sanders**, 1963, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821. At the outset we hold that the court has jurisdiction, plaintiffs have standing to sue, and that a justiciable issue is presented. 28 U. S. C. A., §§ 1343 (3), 2201 and 2202; **Baker v. Carr**, 1962, 369 U. S. 186, 82 S. Ct. 601, 7 L. Ed. 2d 663; **Gray v. Sanders**, supra; **Wesberry v. Sanders**, United States Supreme Court, No. 22, Oct. Term, 1963, decided Feb. 17, 1964; and **Toombs v. Fortson**, N. D. Ga., 1962, 205 F. Supp. 248.

Plaintiffs as well as defendant Fortson have filed motions for summary judgment and we proceed to a consideration of the merits of those motions. While no findings of fact are necessary in the determination of such motions, **Hindes v. United States**, 5 Cir., 1964, 326 F. 2d 150, there is no dispute as to the facts, and they may be briefly stated as follows. We begin with the decision of this court in **Toombs v. Fortson**, supra, holding the General Assembly of Georgia to be malapportioned, and requiring that either the Senate or House of Representatives be apportioned on the basis of population so as to meet minimal constitutional standards of legislative apportionment.

The General Assembly thereafter convened and reapportioned the Senate on the basis of population. The then existing fifty four senatorial districts were reconstituted with the result that they ranged in population from 52,572 to 95,632. Some districts were located together with others in one county; others were made up of one whole county; while the remainder were comprised of two or more counties. For example, seven senatorial districts were located in Fulton County, three each in DeKalb and Chatham Counties, and two in each of the Counties of Bibb, Cobb, Muscogee and Richmond. The 12th Senatorial District is composed of Dougherty County alone, while the 52nd is composed only of Floyd County. The remainder may be described as plural county districts. The remaining districts are composed of from two to seven counties.

The apportionment of the House of Representatives was not changed. Its apportionment, as the court noted in **Toombs v. Fortson**, is based largely on geography, with representatives from the one hundred and three less populous counties of the state making a constitutional majority of the two hundred and five members of the House. At the same time, they represent only twenty two and one half percent of the population of the state. It was also noted that the eight most populous counties, although containing forty one percent of the population of the state, elect only twenty four of the two hundred and five representatives, or a little less than twelve percent of the total number. Each county has at least one representative while no county can have more than three.

The statute reapportioning the Senate, supra, in § 9 thereof, provides as follows:

> "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, except that the Senators from those

Senatorial Districts consisting of less than one county shall be elected by all voters of the county in which such Senatorial District is located."

It was the intent of the General Assembly as expressed in § 12 of this statute that the Senate be apportioned on population and the House on geography. At the same extraordinary session an amendment to the Constitution was proposed to provide that the Senate should consist of fifty four members and that the General Assembly should have authority to create, rearrange and change senatorial districts and to provide for the election of senators from each senatorial district or from several districts embraced within one county. This proposal was adopted by the people of Georgia in the general election of 1962, and by the people of all counties having plural districts save Bibb.

It is that portion of the quoted provision relating to elections in districts consisting of less than one county that plaintiffs seek to have declared unconstitutional as conflicting with the equal protection clause of the Fourteenth Amendment.[1]

They buttress their contention of invidious discrimination on the proposition that the essence of representative government is the selection of the representative by those whom he represents, citing **Toombs v. Fortson**, supra. They state that the representatives elected in the plural district counties are not elected by those whom they rep-

[1] Shortly after the enactment of this statute, and prior to the special election of senators under it, litigation ensued in the state court with respect to its constitutionality under the state constitution. That suit, which affected only those senatorial districts lying within the counties of Fulton and DeKalb, resulted in a decree requiring that the elections be held on a districtwide basis only, and this was the case. However, the senators from the districts lying within the other counties having plural districts were elected on a countywide basis. This was prior to the amendment to the state constitution.

resent since voters so situated do not have the opportunity of choosing their own senator, but must join with others to choose a group of senators. They assert, without contradiction, on the basis of the population of the various districts in Fulton County that only eighteen percent of the voters in the other six districts of that county could nullify the unanimous choice of the voters in the 34th Senatorial District and thrust a representative upon voters of that district for whom no one at all within the district had voted. Of course, this is carried to an extreme but it cannot be disputed that the selection of a senator from these districts is not within the control and province of the voters of the separate districts. By way of contrast, this is not the case with voters residing in districts not situated in plural district counties.

The Secretary of State urges that countywide voting is a rational and permissive classification in the interest of county government.[2] He points to the fact that plaintiffs have a political remedy and have not availed themselves of it even though one of the plaintiffs is a member of the State Senate. It is argued that there has been no dilution or debasement of the votes of plaintiffs since the whole of the fractional parts, i. e., their being able to vote for more than one senator, is equal to the vote of one residing in a district where he votes for one senator only.

We hold that the complaint is meritorious. There is no genuine issue as to any material fact and it appears that plaintiffs are entitled to judgment as a matter of law. Accordingly, the motion of plaintiffs for summary judgment will be granted, and that of the defendant Secretary of State denied.

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[2] Defendants Gunby and Mann did not join in the motion for summary judgment. They appeared at the hearing on the motions, through counsel, and did not dispute the facts, nor did they contest the position of the Secretary of State and plaintiffs that the case was ripe for summary judgment.

The Statute causes a clear difference in the treatment accorded voters in each of the two classes of senatorial districts. It is the same law applied differently to different persons. The voters select their own senator in one class of districts. In the other they do not. They must join with others in selecting a group of senators and their own choice of a senator may be nullified by what voters in other districts of the group desire. This difference is a discrimination as between voters in the two classes. The question is whether the discrimination reaches the point of being invidious for that is the type of discrimination that is proscribed by the Fourteenth Amendment. The Supreme Court in **Gray v. Sanders,** supra, in discussing the Georgia County Unit System where the state was divided into election units varying in population, with the result that voters, as between units, were treated differently to the extent that the votes of some were diluted, pointed out that the system violated the equal protection clause of the Fourteenth Amendment and said:

> ". . . there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State."

We think the rationale of that case is applicable here by analogy. The unit system applied in statewide races and brought about a dilution of votes on the basis of homesite through the use of units. Here the dilution or debasement is of the right of some to choose their representative. It is discrimination in another form, but we think it necessarily follows that voters in some senatorial districts cannot be treated differently from voters in other senatorial districts. The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not. It is an invidious discrimination tested by any standard. Cf. tests laid down

by this court in **Toombs v. Fortson**, *supra*, and **Sanders v. Gray**, N. D. Ga., 1962, 203 F. Supp. 158. We agree that the essence of representative government is the choosing of a representative by those he represents. See memorandum opinion in **Toombs v. Fortson**, unpublished, dated September 5, 1962. And this principle must be applied in an even-handed manner. Its application may not be withheld from while at the same time being afforded others, once a political system such as a division of the state into senatorial districts is adopted.

It is contended that the character of the discrimination can be justified on the basis that harmony between senators is required so that the county in which they reside may be better represented. This is said to be a reasonable classification. See **McGowan v. State of Maryland**, 1960, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393, on the subject of permissible classifications by states. The answer to this is that the Senate is to represent population and not geography. That was the intent of the General Assembly in reapportioning. Protecting the interest of counties may be a high motive but it cannot be done at the expense of the voters of the populous counties as is the case here.

With respect to the fact that plaintiffs have not sought to use their available political remedy, our attention is called to the case of **Spahos v. Mayor and Councilmen of the Town of Savannah Beach**, S. D. Ga., 1962, 207 F. Supp. 688, affirmed, 1962, 371 U. S. 206, 83 S. Ct. 304, 9 L. Ed. 2d 269. There the court in testing for invidiousness did determine that plaintiffs had a political remedy available as distinguished from the stranglehold situation present in **Baker v. Carr**, supra, but there was another overriding consideration in dismissing the complaint. That was that the classification of voters being attacked was found to have a reasonable basis. This is not the case here. Moreover, the teaching of **Wesberry v. Sanders**, supra, decided

thereafter by the Supreme Court, is that available political remedies, as was the case with both state and federal legislative remedies available, is not a bar or even a deterrent to an adjudication or declaration of constitutional rights. It may be the subject of consideration in the determination of the relief to be thereafter accorded, but not in the declaration of rights.

In sum, the Senate was apportioned to population. The state through the statute in question and the medium of constitutional amendment, divided the state into population districts. Having done so, and the circumstances as they relate to voters residing in each being the same; they are entitled to equal treatment. For these reasons, we hold that portion of the statute in question here, to-wit, the requirement "that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all voters of the county in which such Senatorial District is located" to be unconstitutional on the basis of being violative of the equal protection clause of the Fourteenth Amendment. It is therefore null and void. This will leave that portion of the statute in force which provides that each senator shall be elected by the voters of the district of which he is a resident.

The injunctive relief sought is denied. There is no indication that defendants will not follow the law as declared. In fact, plaintiffs stated in open court that this was the case and that they believed injunctive relief to be unnecessary in the event the court voided the statute. These respected and responsible officials are simply caught up in the ferment of change stemming from the recent concept of applying federal constitutional standards to the political process through the use of the judicial process. **Baker v. Carr**, supra, and its progeny. We think that a declaration of rights under the circumstances, with the attendant striking of the infected portion of the statute, will suffice.

Plaintiffs may submit an appropriate order after due notice to counsel for defendants.

This the 27 day of March, 1964.

/s/ Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

/s/ Frank A. Hooper,
Frank A. Hooper,
United States District Judge.

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

In the United States District Court for the
Northern District of Georgia,
Atlanta Division.

James W. Dorsey, Dan I. MacIntyre, III, and James Edward Manget, Plaintiffs,

vs.

Ben W. Fortson, Jr., as Secretary of State of Georgia; Eugene Gunby, Ordinary of Fulton County, and Katherine E. Mann, Ordinary of DeKalb County, Defendants.

Civil Action.
No. 8756.

Final Judgment of the Court.

The above and foregoing matter having been heard by a Three-Judge Court as an action for declaratory judgment and on motions for summary judgment filed by the plaintiffs and by the defendant, Ben W. Fortson, Jr., and the matter properly being before the Court in accordance

with Rules 56 and 57 of the Rules of Civil Procedure, and the Court having entered an opinion, dated March 27, 1964, in favor of the plaintiffs, Now, Therefore,

It Is Hereby Ordered, Adjudged, Decreed and Declared that so much of the statute here under consideration, to-wit: that part of Section 9 of the Georgia Laws, Extraordinary Session, September-October, 1962, at page 7 et seq., that provides "except that the senators from those senatorial districts consisting of less than one county shall be elected by all voters of the county in which such senatorial district is located" is unconstitutional, unenforceable, null and void, as being in violation of the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States.

It Is Further Ordered and Adjudged that the Motion for Summary Judgment of the defendant, Fortson, is overruled and that the Motion for Summary Judgment of the plaintiffs is granted.

It Is Further Ordered and Declared that each and every senator to the State Legislature for the State of Georgia shall be elected by the voters of his own district, without regard to whether said senatorial district comprises an entire county or more than one county, or less than one county.

This 6th day of April, 1964.

s/ Griffin B. Bell,
Judge, United States Circuit Court
Sitting as Senior Judge of a Three
Judge Court for the Northern District of Georgia.

s/ Frank A. Hooper,
Judge, United States District Court.

s/ Lewis R. Morgan,
Judge, United States District Court.